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Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, et al.,

Petitioners,

v.

MILHELM ATTEA & BROS. INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York, et al.,

Petitioners,

v.

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

On Writ Of Certiorari To The Court of Appeals Of The State Of New York

BRIEF *AMICI CURIAE* OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE NATIONAL CONGRESS OF AMERICAN INDIANS, *et al.* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are thirteen federally recognized Indian tribes and one national Indian organization.[2] *Amici* have a substantial interest in issues regarding sales of cigarettes in Indian country. Some *Amici* tribes sell cigarettes to non-tribal members and to members in Indian country, in their convenience stores and in conjunction with other tribal businesses. All *Amici* tribes exercise their sovereign jurisdiction over cigarette sales and other commercial activities in Indian country. They do so under this Court's cases and under other federal law confirming their sovereignty, including their sovereign right to be free from state jurisdiction in Indian country.

The State of New York (hereinafter "the State") here seeks to enforce quotas on the number of untaxed cigarettes that may be sold to tribal members in Indian country. The State also presumes to regulate how and where these sales will occur and how and where such purchases may be used. The paramount issue in this case then is whether a state can regulate cigarette sales to tribal members in Indian country. *Amici* strenuously urge this Court

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[1] Counsel for Petitioner does not object and Counsel for Respondents consent to the filing of the Brief of *Amici*. Their letters are submitted for filing herewith.

[2] The National Congress of American Indians (NCAI) is the oldest and largest national organization of Indian governments and individuals in the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, to enlightening the public toward a better understanding of Indian people, and to preserving rights under Indian treaties and agreements with the United States.

to reject the State's backhanded attempt to regulate such sales.

Several *Amici* supporting the State in this case broadly assert or imply that Indian retailers are not abiding by their obligations under federal law to collect and remit valid state taxes on cigarette sales to non-tribal members, and that Indians are engaged in widespread marketing of naked cigarette tax exemptions to non-members in Indian country. *Amici* urge this Court, in fashioning its opinion in this case, to consider that many tribes have enacted regulations or entered into agreements with states addressing cigarette tax collection in Indian country, and that sales of cigarettes in Indian country to non-members increasingly occur in the context of value generated on the reservation and in conjunction with the provision of services to non-members.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, wholesale distributors who supply cigarettes to Indian retailers on reservations located in New York challenge the State's cigarette tax laws and regulations. The New York Court of Appeals held the laws and regulations invalid under federal law. The court distinguished the laws and regulations here from those involved in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) on the grounds that the State assesses its cigarette taxes on wholesalers, not retailers. The court then held that the rule of *Warren Trading Post Co. v.*

Arizona Tax Comm'n, 380 U.S. 685 (1965), that federal law has completely preempted state regulation of reservation Indian trade, applied in this case rather than *Moe* and its progeny. Alternatively, the court found the laws and regulations impose undue burdens on the wholesalers.

The New York Court of Appeals reached the correct result, at least with respect to regulation of sales of cigarettes to tribal members, though it failed to note the most compelling reason for that result. The thrust of the state laws and regulations is twofold. The laws assess wholesalers for taxes imposed on retail cigarette sales, including sales on Indian reservations to non-tribal members.[3] The regulations regulate on-reservation sales of untaxed cigarettes to tribal members. They do this by dictating how and where tribal Indians can sell, purchase, and use untaxed cigarettes. In this sense the state regulations are unlike any heretofore examined by this Court.

In Part I of this Brief *Amici* address the State's regulation of sales of cigarettes to tribal members in Indian country. We show how that regulation is preempted by federal law and infringes on tribal self-government.

In Parts II and III we address the analytical approach this Court should adopt in determining whether and how a state may enforce its taxes on cigarette sales to non-members in Indian country in two situations involving tribal interests not presented by the facts of *Moe* and *Colville*.

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[3] *Amici* do not address the issue of the State's right to assess wholesalers for taxes imposed on retail sales of cigarettes to non-tribal members in Indian country.

The first situation involves tribal efforts to comply with the holdings in *Moe* and *Colville* that tribes must assist in enforcing valid state taxes on cigarette sales to non-members. We urge this Court to adopt the principle that the existence of tribal laws or tribal-state compacts which address collection and remittance of the state taxes overcomes the presumption that a state enforcement scheme is necessary to prevent tax evasion, and shifts the burden to the state to show that the tribal enforcement scheme is ineffective.

The second situation focuses on the nature of the cigarette sales and involves instances where the sales to non-members are an incidental aspect of a larger on-reservation tribal economic enterprise involving provision of services to non-members. In such situations, we urge the Court to adopt the principle that the state's interest in taxing non-member sales is outweighed by tribal and federal interests and therefore state taxes may not be imposed on such sales.

ARGUMENT

I. THE STATE CIGARETTE TAX REGULATIONS IN THIS CASE ARE INVALID UNDER FEDERAL LAW AT LEAST TO THE EXTENT THEY RESTRICT SALES OF UNTAXED CIGARETTES TO TRIBAL MEMBERS IN INDIAN COUNTRY

The State here comprehensively and unlawfully regulates sales of cigarettes to tribal members in Indian country at the retail and consumer levels. It prescribes how many untaxed cigarettes can be sold to Indian retailers on

their reservations, where the retailers must take delivery of these cigarettes, how the tribal members must use the untaxed cigarettes they buy, and where they must use them.

The State incorrectly frames the issue regarding these regulations as whether they are "minimal burdens" designed to assist in the collection of valid state taxes on reservation sales of cigarettes to non-tribal members. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) sanctioned the imposition of minimal burdens by states on tribes which were reasonably necessary to prevent fraud in cigarette sales to non-members. In *Colville*, for example, state regulations requiring tribes and Indian retailers to keep records of the numerical and dollar amounts of sales they made to non-tribal members and to tribal members were upheld. 447 U.S. at 160.

However, no attempt was made by states in those cases to restrict the number of untaxed cigarettes which could be sold to tribal members. This distinction is critical. The minimal burden test should not be applied to determine the validity of direct state regulation of sales to members. Rather, such regulation is invalid because it is preempted by federal law and infringes on tribal self-government.

A. State Regulation Of Cigarette Sales To Tribal Members In Indian Country Is Preempted By The Indian Traders Statutes And By The Compelling Federal And Tribal Interests In Tribal Self-Government And Economic Development

The State here sets a quota on the number of untaxed cigarettes which Indian retailers may purchase for resale on their reservations. 20 NYCRR §§ 335.7(b), 335.7(c), and 335.7(d). Indian retailers are prohibited from purchasing, selling, or possessing untaxed cigarettes beyond the quota. *Id.* at § 335.7(e); *see also* New York Tax Law §§ 481, 1814, 1846, and 1847 (proscribing civil and criminal penalties for unlawful possession of untaxed cigarettes). The State readily admits it limits "the amount of tax free product which may be purchased by the tribal retailers. . . . " State's Op. Br. at 24.

The quota is based on an amount "reasonably related to the probable demand" for cigarettes by tribal members on a reservation. 20 NYCRR § 335.7(d)(1). Probable demand is determined in one of two ways. *Id.* at § 335.7(d)(2). The State must consult with tribes that regulate, license, or control the sale and distribution of cigarettes within their reservations regarding evidence the tribes may submit to such probable demand, including sales records, consumption records, tribal enrollment records, and other statistical evidence. *Id.* at § 335.7(d)(2)(i). In the absence of tribal regulation or evidence, the State will calculate the probable demand "based on the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe. . . . " *Id.* at

§ 335.7(d)(2)(ii); *see also* State's Op. Br. at 19 (probable demand is "an amount no greater than the maximum legitimate Indian consumption of the reservation").

Wholesalers and Indian retailers must register with the State to purchase untaxed cigarettes. 20 NYCRR §§ 335.6(b)(4) and 335.6(f). Prior approval of the State or regulating tribe is required for each sale or delivery of untaxed cigarettes. *Id.* at § 335.7(c). The quota system is implemented through a "coupon system" imposed on wholesalers and Indian retailers. *See* Notice to Registered Distributors of Motor Fuel, Diesel Motor Fuel and Licensed Cigarette Agents Regarding Sales of Tax-Free Product on Indian Reservations, N-88-53, New York State Department of Taxation and Finance, *reprinted in* the Joint Appendix in this case at 44a-50a.

The State issues monthly, to all registered wholesalers and Indian retailers, an allotment of coupons (each coupon represents 400 packages of cigarettes) based on the quotas of untaxed cigarettes for each reservation.[4] Coupons are among the sales records which wholesalers

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[4] The regulations set the quota on a reservation-wide basis, but do not explain how that quota is to be shared among wholesalers or Indian retailers where there are more than one dealing with or operating on a reservation. Likewise, Notice N-88-53 provides that "[t]he reservation allotment of tax-free product will . . . be allocated among the registered dealers located on that reservation by means of a tax exemption coupon," but fails to explain how. It is reasonable, however, to presume that the State has some means of addressing the division of the quota among reservation retailers. Such action intensifies the state intrusion into the federally preempted field of regulating sales to tribal members.

and Indian retailers must complete and remit to the State. Untaxed cigarette purchases by the retailers must be made according to the coupons which specify the dealer, location of delivery, and numerical amount of cigarettes which may be delivered/purchased. Notice N-88-53; *see also* State's Op. Br. at 12-13 and 22-23.

As purchasers and consumers of untaxed cigarettes, tribal members are also regulated. They may buy untaxed cigarettes only "within the boundaries of a qualified reservation for [their] own use or consumption (i.e. other than for resale) within such reservation." 20 NYCRR § 335.6(b)(1)(ii); *accord* § 335.6(e)(1) (tribal members may purchase untaxed cigarettes only if they take delivery of the cigarettes on their reservations and purchase them for their own use or consumption within such reservation). Hence, tribal members apparently cannot, for example, give untaxed cigarettes as gifts to other tribal members, and they clearly cannot smoke or take them off their reservations.

All of these provisions go far beyond recording and reporting cigarette sales made to tribal members and amount to direct regulation of those sales unauthorized by any act of Congress and contrary to decisions of this Court. In *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), this Court invalidated the application of a state sales tax on sales made to reservation Indians. The Court held the traders statutes, 25 U.S.C. §§ 261-264, part of the historic "comprehensive federal regulation" of trade on Indian reservations, preempted the state law. 380 U.S. at 686 and 688. Specifically, the Court stated:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens. . . .

Id. at 690.

Subsequently, the Indian traders statutes have been held to preempt a variety of state taxes on reservation commercial transactions and activities. *E.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) (motor carrier license and fuel use taxes as applied to non-Indian logging company operating on reservation); *Central Machinery Co. v. Arizona Tax Comm'n,* 448 U.S. 160 (1980) (transaction privilege tax of on-reservation sale of tractors to Indian enterprise); *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832 (1982) (tax on gross receipts of non-Indian construction company received from tribal school board for construction of school on reservation).

Taxation is merely a form of regulation and the traders statutes themselves do not speak in terms of how a state may regulate, they speak to whether the state may regulate and they say it may not. As this Court stated in *Central Machinery*:

> [W]e held in Warren Trading Post by enacting these statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject. . . . ' Until Congress repeals or amends the Indian traders statutes . . . we must give them 'a sweep as broad as

> [their] language . . . ' and interpret them in light of the intent of the Congress that enacted them.

448 U.S. at 165-66 (citations omitted); *accord Colville,* 447 U.S. at 155-56 ("The Indian traders statutes incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange").

Moreover, this Court has held state regulation of tribes in Indian country to be preempted in cases where taxation was not involved or was involved along with other regulations. In *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), a state sought to apply its gambling laws to tribal reservation bingo games. The Court found no federal statute authorizing the state's asserted jurisdiction and therefore noted that the "[d]ecision in this case turns on whether state authority is preempted by the operation of federal law. . . . " 480 U.S. at 216.

The Court in *Cabazon* found the applicable tribal and federal interests there to be "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," as well as promotion by federal agencies of tribal bingo under various federal laws and programs. 480 U.S. at 216-19.[5] These "compelling federal and tribal interests"

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[5] Similarly, other federal statutes and programs likely support Indian cigarette sales. *See* Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 888 F.2d 1303, 1304 (10th Cir. 1989), *aff'd in part and rev'd in part,* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)

preempted the state laws. *Id.* at 221-22; *see also Moe*, 425 U.S. at 480-81 (vendor license fee on reservation Indian business held preempted); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. ___, 113 S.Ct. 1985 (1993) (motor vehicle registration fee on tribal members in Indian country held preempted).

Under the traders statutes and these cases the State regulation of cigarette sales to tribal members in Indian country here is preempted. Once federal preemption of an activity is found, the inquiry is over. All state regulation is prohibited, since there is "no room" for it. *Warren Trading Post*, 380 U.S. at 690. On this point the New York Court of Appeals was absolutely correct. There is no need to reach the minimal burden question with respect to state regulation of reservation cigarette sales to tribal members because there is no room for any burdens.

B. State Regulation of Cigarette Sales to Tribal Members In Indian Country Infringes on Tribal Self-Government

The State's asserted regulation of intra-tribal trade in Indian country also must fail because it infringes on the right of Indian tribes to self-government. Infringement on tribal self-government is an independent barrier to the application of state law to tribal members in Indian country. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142-43. This Court has long recognized that state law may not infringe "on the right of reservation Indians to make

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(tribal convenience store selling cigarettes was constructed with federal funds).

their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

State regulation of cigarette sales to tribal members in Indian country would clearly interfere with significant tribal and federal interests, including the Indian sovereignty and immunity doctrines and the congressional goal of tribal self-government, especially the "overriding goal of encouraging tribal self-sufficiency and economic development." *See Potawatomi*, 498 U.S. at 510.

The quota in particular would adversely affect tribes that both sell cigarettes and tax those sales because it would limit their potential sales revenues and tax revenues. Even where tribes do not tax, the quota would restrict potential sales revenue available to support the operation of tribal governments and the delivery of governmental services. The quota could also limit private revenues and employment opportunities in retail sales, thereby contributing to unemployment and poverty in Indian country. The other regulations on tribal members as retailers and consumers present obvious further intrusions on "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. at 220.

If the State here were taxing the cigarette sales to tribal members it could not do so under *Moe*, *Potawatomi*, and other cases of this Court, *e.g.*, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973) (Indian tribes and their members are "per se" exempt from state taxation in Indian country unless Congress provides otherwise). *A fortiori* the State cannot regulate these sales. Indeed, the very nature of non-taxing regulations may present more of a threat to tribal self-government. Dual taxation of

non-members in Indian country has been upheld in part because taxpayers can be subject to different sovereigns. *E.g., Colville*, 447 U.S. at 152-53 (state and tribal cigarette taxes); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (state and tribal oil and gas severance taxes). But, as the Court has recognized, compliance with dual regulatory schemes is much more difficult, if not impossible. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (landowner cannot comply simultaneously with tribal and county zoning and land use regulations); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (denying state authority to regulate hunting and fishing by non-members on a reservation concurrently with tribe).

State regulation of sales of cigarettes to tribal members in Indian country simply cannot be reconciled with tribal self-government and self-determination.[6] Hence, the decision below must be affirmed at least with respect to the application of the state regulations to sales of cigarettes to tribal members.[7]

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[6] Where federal and tribal interests have preempted a field, there is no balancing of the state's interest. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. ___, 112 S.Ct. 683 (1992). In such cases states may only regulate tribal members in Indian country with express congressional authorization. *Id.* at 692.

[7] *Amici* express no opinion on the issue of whether the unlawful regulation of cigarette sales to tribal members invalidates the entire state cigarette tax scheme. And, because we are convinced that the federal preemption and infringement doctrines govern the decision in this case regarding state regulation of sales to tribal members, we do not address the issue of whether the state laws and regulations here impose undue burdens under *Moe* and *Colville*.

II. IN CASES WHERE A TRIBE HAS ENACTED ITS OWN ENFORCEMENT SCHEME OR ENTERED INTO A COMPACT WITH A STATE WHICH ADDRESSES THE COLLECTION AND REMITTANCE OF VALID STATE TAXES ON CIGARETTE SALES TO NON-MEMBERS IN INDIAN COUNTRY, THE APPLICABLE PRESUMPTION SHOULD BE THAT SUCH TRIBAL LAWS AND COMPACTS PREEMPT THE STATE'S ENFORCEMENT SCHEME

A state's interest in regulating the activities of non-members in Indian country must be weighed against the relevant tribal and federal interests. *Colville*, 447 U.S. at 156-57; *accord White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144-45. The issue of the State's regulation of cigarette sales to non-members in Indian country here should be considered in light of a tribal interest apparently not present in the record in this case, but which nevertheless is pertinent to the ultimate reach of this decision – one which will affect all of Indian country. That interest relates to the exercise of tribal governmental powers in compliance with *Moe* and *Colville*.

Several *Amici* tribes have enacted codes and ordinances which govern taxation and regulation of cigarette sales to members and non-members in Indian country.[8]

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[8] *E.g.*, Chapter 2, Cheyenne-Arapaho Tribes of Oklahoma General Revenue and Taxation Act of 1988, Ordinance No. 8118003 (Apr. 27, 1988); Confederated Salish and Kootenai Tribes of the Flathead Nation Tax Exempt Sales Ordinance, No. 94A (Sept. 28, 1993); Sisseton-Wahpeton Sioux Tribes Codes of Law, Chapter 10, Retail Business Tangible Personal Property Sales Tax Act (Feb. 5, 1986) and Chapter 12, Tribal Tobacco Outlets and Excise Tax (May 4, 1982).

Amici are aware of other tribes which have similar regulations. Some *Amici* have entered into compacts with states which govern cigarette tax collection and enforcement in Indian country.[9] *Amici* are aware of a growing number of other tribes which have entered into similar agreements.

Where such tribal regulations or compacts address the collection and remittance of valid state taxes on cigarette sales to non-members, there is no need for a state unilaterally to impose additional requirements. In instances where there was no finding of such a tribal system, this Court has approved a rebuttable presumption that a state may impose "minimally burdening" collection and recordkeeping requirements on tribes and Indian retailers. *Moe*, 425 U.S. at 482-83; *Colville*, 447 U.S. at 159-60. *Colville* in particular recognizes that a tribe may rebut the presumption by showing that the asserted state requirements are not reasonably necessary as a means of preventing fraud. 447 U.S. at 160.

This Court should now acknowledge that if there is a tribal scheme, adequate accountability is presumed and the burden is on the state to show that accountability is lacking. Hence this Court should clarify that tribal laws and compacts defeat the presumption that a state may

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[9] *E.g.*, Agreement Between the Shakopee Mdewakanton Indian Community and the Department of Revenue of the State of Minnesota Relating to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 1988); Agreement Between the Stockbridge-Munsee Tribe and the Department of Revenue of the State of Wisconsin Related to the Refund of Precollected Excise Taxes on Cigarettes (Aug. 1988).

impose even minimal burdens on tribes and Indian retailers in Indian country.

Otherwise, this Court will be sanctioning a presumption that tribes will be dishonest or incompetent, which is wholly unwarranted as a blanket rule for Indian country. In other contexts this Court has rejected arguments that such general attacks on tribes are justifiable. *E.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion [of tribal remedies] requirement" established in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 342 n.27 ("We reject the State's claim that the Tribe's ability to manage its wildlife resources suffers from a lack of enforcement powers and therefore concurrent jurisdiction is necessary to fill the void").

The Court has recognized that Congress has spoken to this issue as well. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (under the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923, state and federal courts "must defer to the experience, wisdom, and compassion of the [] tribal courts to fashion an appropriate remedy" for tribal children). These cases and statutes teach that tribes are to be trusted in the first instance and the burden is on the state or non-Indian party to prove otherwise.

This Court recently suggested that tribes and states may work cigarette tax issues out together to their mutual satisfaction. *Potawatomi*, 498 U.S. at 514. Similar encouragement and flexibility is warranted in this case as well.

The fact that many tribes have developed tribal laws and have negotiated compacts with states aptly demonstrates these issues can be worked out at the local level. *See* Brief of *Amici* States of Washington, *et al.* in Support of Petitioner at 20 ("Consistent with the Court's suggestion in *Potawatomi*, a number of states and tribes have sought, with some success, to negotiate compacts for the collection and distribution of cigarette taxes. . . . Other negotiations in the area of cigarette taxes and motor vehicle fuel are continuing").

III. IN CASES WHERE CIGARETTE SALES ARE AN INCIDENTAL ASPECT OF A LARGER, RESERVATION-BASED TRIBAL ECONOMIC DEVELOPMENT PROJECT, TRIBAL INTERESTS MAY OUTWEIGH STATE INTERESTS IN TAXING NON-MEMBER CIGARETTE PURCHASES

Sales of cigarettes in Indian country today are vastly different from when this Court decided *Moe* and *Colville*. Such sales do not always occur at "smoke shops." They may occur at grocery stores or other establishments at which cigarettes are but a minor or insignificant item in the overall business operation. More and more often, cigarette sales in Indian country take place at tribal casinos, bingo halls, resorts, lodges, sports and recreation facilities, and other major economic development projects initiated and maintained by tribes. *See, e.g., Cabazon*, 480 U.S. at 205 (tribal bingo halls and card clubs); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 327 (tribal hunting and fishing resort complex); *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992) (tribal sporting, recreational, and cultural facilities consisting of lake

marina, automobile race tracks, and performing arts amphitheatre).

Many non-members visit these tribal enterprises, some for significant periods of time, not because they can buy untaxed cigarettes, but because they want to enjoy the benefits of the tribal economic development project. Non-members may purchase cigarettes while they are enjoying the benefits of the tribal project. But their primary purpose for entering and being in Indian country is other than to buy cigarettes.

In short, contrary to the views of the State's supporting *Amici* in this case, non-members are not always attracted to Indian country solely because of cheap cigarettes, and sales of cigarettes to non-members in Indian country are not always tantamount to the sale of a tax exemption. Moreover, when they are in Indian country, non-member visitors as well as non-member employees of the tribal project are entitled to and do receive significant services provided by tribes, such as police and fire protection, ambulance and emergency medical services, roads, water, and other public utilities, and tribal judicial systems.

Where sales of cigarettes to non-members are an incidental and relatively minor aspect of an overall tribal project, and where the non-member is the recipient of significant tribal services, the state may have little, if any, interest in taxing the non-member cigarette purchases. And there may be other preemptive and infringement forces at work. In *Cabazon*, the Court expressly distinguished *Colville* and stated the following:

Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

> . . . The tribal bingo enterprises are similar to the resort complex featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation. . . . The Mescalero project generates funds for essential tribal services and provides employment for tribal members. We there rejected the notion that the tribe is merely marketing a tax exemption from state hunting and fishing regulations. . . . Similarly, the Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest.

480 U.S. at 219-20. In *New Mexico v. Mescalero Apache Tribe*, the Court had found the "concerted and sustained" undertakings of the tribe there to develop its reservation economy were "far removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis*." 462 U.S. at 341.

States cannot tax or regulate these tribal economic enterprises directly. *Id.*; *accord Cabazon*, 480 U.S. at 220-21; *see also* the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(4) (states cannot impose taxes, fees, or charges on tribes engaged in gaming). State taxes on cigarette

sales incidental to these enterprises may be prohibited as well. *See Indian Country U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (holding state sales taxes on tribal bingo enterprise and related activities, including food services for patrons and sales of bingo supplies and accessories, preempted by federal law).

CONCLUSION

For the reasons stated above, the decision of the New York Court of Appeals should be affirmed.

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Respectfully submitted,

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